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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 674

JOHN THOMAS, WILLIAM McCOY, JOHN SALTERS, ISAAC SIZEMORE, RAY TRANTHAM, ELLIS COLEMAN, JR., LEE LOONEY, JOHN YATES, and CHARLES TAYLOR,

Petitioners,

vs:

CONSOLIDATION COAL COMPANY, a corporation, (POCAHONTAS FUEL COMPANY DIVISION) and THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association, (DISTRICT 29), and LOCAL UNION NO. 9690, UNITED MINE WORKERS OF AMERICA, an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

D. GROVE MOLER
Attorney For Petitioners
Mullens, W. Va.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on May 15, 1967; rehearing denied, July 6, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported in ___ F. Supp. ___. It is not printed in the Appendix because

not pertinent to the issue. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, infra, page 15, is reported in ___ F. (2d) ___. The order of the Circuit Court of Appeals, upon application for rehearing, is printed in Appendix B, hereto, infra, page 41.

The judgment of the Circuit Court of Wyoming County, West Virginia, entered March 8, 1965, is printed in Appendix C hereto, infra, page 42. The Circuit Court did not write or file an opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1967. (Appendix A, page 15 infra). Re-hearing was denied July 6, 1967. (Appendix B, page 41, infra).

The jurisdiction of this Court is invoked under *28 U.S.C. Section 1254 (1).*

QUESTIONS PRESENTED

1. Does a state court judgment of dismissal, *without assignment of any reason and without an opinion,* entered in apparent response to mere motions challenging (a) jurisdiction of the subject matter as being exclusively in the federal courts or the National Labor Relations Board, (b) jurisdiction of certain defendants, and (c) the sufficiency of the complaint or the alleged cause of action, constitute res judicata barring individual mineworker employees from prosecuting their subsequent suit in an United States District Court against substantially the same defendants or their privies, upon the same alleged cause of action, to-wit, breach of a collective bargaining agreement under authority of *Chapter 120, Title III, Section 301, 61 Stat. 156?*

2. Does the decision of the Circuit Court of Appeals, so holding, deprive said individual employees of due process of law—their right to proceed in a federal court under a right conferred by federal statute?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment V

"No person shall be..... deprived of life, liberty or property without due process of law ....."

Amendment XIV

"..... [N] or shall any State deprive any person of life, liberty or property, without due process of law ....."

The statute involved is Chapter 120, Title III, Section 301, 61 Stat. 156; 29 U. S. C. A. 185 (a):

"Suits for violation of contracts between an employer and a labor organization ..... may be brought in any district court of the United States ....."

STATEMENT

Petitioners instituted this action in the United States District Court for the Southern District of West Virginia for violation of a collective bargaining agreement between their employer, Consolidation Coal Company, and the United Mine Workers of America which resulted in their wrongful discharge. Jurisdiction of the District Court was invoked under Chapter 120, Title III, Section 301, 61 Statutes 156; 29 U.S.C.A. 185(a). The complaint disclosed exhaustion of contractual grievance procedure resulting in a decision against petitioners but charged that such decision was fraudulently induced by conspiracy and wrong conduct upon the part of the

respondents (App. D, page 43, infra). Said respondents separately moved to dismiss the complaint challenging the jurisdiction of the District Court, the sufficiency of the complaint, the particularity of allegations of fraud, and that res judicata barred the action on the basis of a final order of the Circuit Court of Wyoming County, West Virgnia, entered therein on the 8th day of March, 1965, (Appendix C, page 42, infra). No other defense pleadings were filed. On the basis of these motions alone the District Court ordered dismissal because of failure to sufficiently particularize the allegations of fraud or conspiracy. Petitioners appealed to the Circuit Court of Appeals, which, upon appearance of counsel for argument, directed counsel for both petitioners and respondents to brief the issue of res judicata—there being no pleading covering the same then in the record other than the bare motions to dismiss. This being done, the Circuit Court of Appeals affirmed the District Court's dismissal but solely upon the ground of res judicata. (See Opinion, Appendix A, infra, page 15, 17).

The facts pertaining to the prior proceeding in the said state court are as follows. The petitioners, plaintiffs in the state court, first filed a complaint similar to that filed in the District Court (Appendix D, infra, page 43), but upon objection being made that under West Virginia law unincorporated associations such as labor unions could not be sued as "jural entities," *Milam v. Settle, 127 W. Va. 271, 32 S.E. (2) 269,* an amended complaint was permitted substituting for the union, the individual representatives involved. At this point the defendants, now consisting of the employer corporation, two individual officers or representatives of the International Union United Mine Workers and two representatives of a local union, filed motions to dismiss the action or complaint. The defendant Company challenged the jurisdiction of

the state court over the subject matter alleging jurisdiction exclusively in the Federal Court, and the other defendants (individuals in lieu of unions) challenged such jurisdiction on the ground that Congress had preempted the jurisdiction of both Courts over the subject matter by assigning it exclusively to the National Labor Relations Board. Defendants also challenged the sufficiency of the complaint, and the particularization of fraud. Although requested to rule distinctly upon the jurisdictional question (Appendix E, infra page 55) and although defendants briefs were addressed to like issue (Appendix F, G, and H, pages 57-61, the state court did not make any findings of fact or law and did not file an opinion. Its sole action was entry of the order of dismissal of March 8, 1965, Appendix C, page 42, infra. There were no depositions, no affidavits, no stipulations, no concessions. Upon which ground or grounds the State court based its decision does not appear from the face of the record.[1]

The Fourth Circuit Court of Appeals in its opinion, while finding the said State court not only had jurisdiction of the subject matter (Appendix A, page 36-37 infra) and a non-demurrable complaint before it, (Appendix A, page 30 infra) held that the petitioners were not entitled to pursue their remedy in the District Court because the State court *might possibly* have rendered either a correct or an incorrect decision upon some other ground than the grounds which challenged jurisdiction of the court or of particular parties—hence there was a decision upon the merits that bars petitioners from further pursuing their rights under a Federal statute in a Federal court which has concurrent jurisdiction of the subject matter involved. To reach

[1] Petitioners applied to the West Virginia Supreme Court for an appeal but the application was denied without assignment of reason leaving the judgment of the lower court to stand.

this result, since the State court did not file an opinion or set forth any reason, the Circuit Court of Appeals first *assumed* that the State court could not or did not make an erroneous finding upon the grounds involving jurisdiction of the subject matter or non-joinder of parties—for if the contrary was assumed then there would have been no decision on the merits to bar subsequent action. Having thus closed this escape by such assumption, the Circuit Court of Appeals then *assumed* that the State court decided at least one of the remaining questions erroneously—if it had not decided one or more erroneously there would have been no dismissal but the case would have proceeded to trial in the State court. Hence, by pure assumption, without any basis therefor in the State court record, the Circuit Court of Appeals concluded the State court did not make erroneous findings with respect to grounds which would not bar a subsequent action in the United States District Court but did make erroneous findings with respect to other grounds which could be considered as judgment on the merits[2] —thus res judicata was born, to manifest injustice to petitioners.

REASONS FOR GRANTING THE WRIT

Petitioners have been denied the right to pursue relief afforded by a Federal Statute in a Federal court because a State court, although having jurisdiction of the subject matter, has denied them a right to pursue the same or a like remedy against substantially the same defendants or privies in the State court. The asserted justification offered for such denial is a highly technical application of the doctrine of res judicata, to-wit, that a bare order of dismissal, without finding of fact or assignment of

[2] Analysis of the fifteen grounds is set forth in the Petition of Plaintiffs For Re-Hearing, filed in the Circuit Court of Appeals of the Fourth Circuit, June 6, 1967.

reasons and without any supporting written opinion of the State court, constitutes an adjudication on the merits, when the essential record before the State court consisted wholly of the complaint, and (a) motions of defendants to dismiss for want of jurisdiction of the subject matter, and of some of the defendants and (b) other assigned grounds which add up to a demurrer challenging the sufficiency of the complaint or no cause of action. The asserted theory is that the State court *may* have based its decision upon some other ground than one challenging jurisdiction of subject matter or parties.

I

The application by the Fourth Circuit Court of Appeals of the doctrine of res judicata conflicts with the application of the doctrine in other Districts under comparable circumstances and with the prevailing general law applicable in the circumstances.

The clearest statement is "Where a number of grounds for dismissal of an action are urged, an order of a court simply that the cause be dismissed, without an indication as to the ground upon which the court acted, cannot be res judicata of all possible grounds for such order." *West Coast Life Ins. Co. v Merced Irrigation District, 114 F. (2d) 654 (9th Circuit) cert. den. Pacific Natl. Bank of San Francisco v Merced etc 61 S. Ct. 441, 311 U.S. 718, 85 L. Ed. 467; reh. denied 61 S. Ct. 620, 312, U.S. 714, 85 L. Ed. 1144.*

In an earlier case in the same *Ninth Circuit* the issue involved a demurrer which included two grounds (1) that the court had no jurisdiction of the subject matter and (2) that the complaint did not state facts sufficient to constitute a cause of action. In holding that this was not a judgment on the merits which barred subsequent

action, the Court said "The judgment sustaining the demurrer does not specify upon what ground the court sustained it. If the demurrer was sustained on the ground that the court had no jurisdiction there would be no judgment upon the merits. Since it cannot be determined by an examination of the record upon what ground the court sustained the demurrer it must follow that the judgment is not a bar." *Edwards v. Bodkin, 267 F. 1004.*

In *1 B Moore's Federal Practice ¶ 0.409(7)*, the author says "But if it cannot be determined from the record that both matters (in bar and in abatement) were adjudged the judgment is generally not to be considered on the merits unless the contrary can be shown," Citing *Hartmann v Time, Inc. (C.C.A. 3rd. 1949), 166 F. (2) 139, 1 A.L.R. (2d) 370; cert. den. 334 U.S. 838, 68 S. Ct. 1495, 92 L. Ed. 1763* and *Clark v Scoville, 198 N. Y. 279, 91 N.E. 800.*

In *Freeman on Judgments, 5th Ed. Sec. 749* the rule reads:

> "Where a demurrer is based upon several grounds, some of which go to the merits and others do not, the judgment founded thereon will not be treated as one on the merits where it does not appear on what ground the demurrer was sustained, particularly where it could only properly have been sustained on grounds not going to the merits. Thus where the demurrer is both to the jurisdiction of the Court and for failure to state a cause of action and the order sustaining it with leave to amend fails to show on what ground it was based, the subsequent judgment after failure to amend, dismissing the complaint is not on the merits."

Re-statement of the Law, Judgments, 49c reads:

"Several issues. Where the defendant makes two defenses, one on the merits and the other not on the merits, and the judgment is given for the defendant, and the defendant relies upon the judgment as a bar in a subsequent action brought by the plaintiff on the same cause of action, the burden of proof is upon the defendant to show that the judgment was on the merits. If it does not appear whether the judgment was based on the defense which was on the merits, the plaintiff is not precluded from maintaining the second action. Where the judgment is based upon two alternative grounds, one on the merits and the other not on the merits, there is a decision on both grounds although either alone would have been sufficient to support the judgment, and a subsequent action based upon the same cause of action is ordinarily barred. If, however, the court decides that it has no jurisdiction over the defendant and also that no cause of action is shown, the latter decision is so clearly unnecessary to the result that it is not a bar to a subsequent action in a different court."

"Where there are two issues in a case, upon either of which a judgment may rest, one going to the merits and the other not, its disposition is generally considered as resting upon the latter, so that the merits remain unadjudicated, unless the judgment appears to have been upon the merits." *30-A Am. Jur. p. 390.* And the burden of proving that the prior judgment was upon the merits is upon the defendants who are relying thereon. *Restatement of Judgments, Sec. 49c; 30-A Am. Jur. p. 511.* In what way does it appear that any of the defendants in this case have carried that burden of proof? Reciting the grounds of dismissal is hardly persuasive. Defendants in the State court said to the State Court you

should sustain our motion to dismiss because the remedy lies exclusively elsewhere.

In the instant case the Fourth Circuit has, contrary to these principles, in its Opinion, Appendix A, infra, 15, concluded that a judgment of dismissal without assignment of grounds or reasons or supporting opinion upon motions to dismiss which recited multiple grounds, including challenge to (1) jurisdiction of subject matter and parties and to (2) cause of action and sufficiency of complaint, is to be considered as upon the merits. No authority was cited for this conclusion. The multiple grounds were simply described as to whether or not they fell into one class or the other, and then subjected to the peculiar technique of *assuming* the State court ruled or could have ruled erroneously upon each of them which could come within the description of the "merits." To have omitted such assumption of erroneous ruling would have defeated the result of holding the judgment of dismissal to be res judicata of a federal cause of action.

Nor did the Fourth Circuit rely upon the statement in *Angel v. Bullington, 330 U.S. 182* (a diversity action)[3] that "The 'merits' of a claim are disposed of when they are refused enforcement." Upon the contrary it found that case not applicable, Appendix A, infra, page 36. There the State court rendered an opinion showing the reason for refusing the plaintiffs' suit. No speculation about the basis for dismissal was necessary. This case

[3] In *Angel v Bullington, 330 U. S. 183*, the plaintiff, like petitioners in this case, elected not to appeal to the United States Supreme Court from the highest State tribunal but to seek their remedy where jurisdiction remained—and where the employer invited them to seek it in the Federal Court. This should have no effect upon the decision for "The application of the principle of res judicata has not in any way been made to depend upon whether the judgment in question is subject to review in another tribunal . . . . . the fact that a judgment may or may not be appealable should have no bearing upon its effect as res judicata." *2 Freeman, Judgments (5th ed.) 1339.* See also Justice Rutledge's dissenting opinion in *Angel v Bullington, supra, p. 671.*

presents an exception, not ruled upon by this Court, a case in which resort to a federal court to prosecute a right based on a federal statute is foreclosed by a harsh, technical, application of the doctrine of res judicata to a previous state court judgment of dismissal that assigns no reasons therefor, and where the State court record does not support any conclusion of a decision on the merits.

II

The Circuit Court of Appeals was plainly wrong and its decision manifestly unjust; the technique of decision is a substantial departure from accepted procedure.

It is now well established by decisions of this Court that *Section 301, of the Labor Management Relations Act of 1947, 61 Stat. 156,* provides for substantive law, and that individual members of unions can resort to federal or state courts for violation of collective bargaining agreements.[4] Petitioners therefore had the right to first seek their remedy in the State court. There they were dismissed at the threshold without assignment of reason by the State court. They subsequently turned to the Federal Court, and here, by reason of the Fourth Circuit's opinion, they are turned away upon a bundle of assumptions concerning the action of the State Court now said to add up to a decision on the merits.

In Petitioners' application for a re-hearing by the Fourth Circuit the dilemma was stated in the following language:

"Why is it to be presumed as a fact that with respect to those grounds which would not sustain res

[4] Textile Workers Union etc. v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. (2) 972; Smith v. Evening News Ass'n., 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. (2d) 246; Carey v Westinghouse Electric Corporation, 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. (2d) 320; Humphrey v Moore, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. (2d) 370.

judicata the State court was fully cognizant of the applicable law and properly applied and interpreted it, and with respect to those grounds which would sustain res judicata, the same State court is presumed not to have known the law or to have misapplied it? Yet without such irreconcilable presumptions of fact there is no sound basis for the application of res judicata to the issues raised in the State court to achieve the announced decision in this case."

Inspection of the assigned multiple grounds of dismissal, (eliminating one ground which called for estoppel and was not within the scope of a bare motion to dismiss) will show two issues were before the State Court upon which it could exercise its judgment (1) the issues of jurisdiction and (2) whether or not the complaint stated a cause of action. It was the first of these—jurisdiction of subject matter or misjoinder or non-joinder of parties —which the State Court was asked to rule upon clearly and distinctly (App. E, G, pages 55, 60, infra) and the point argued above all others (App. F, H, pages 57, 61, infra). The State Court merely dismissed without reason.

The multiple grounds, when classified, fall within the above stated rules, (supra, pages 7-10) and the State Court decision should have been held no bar to relief in the District Court. Refusal to permit prosecution of the case in the District Court violates "due process."

III

The decision of the Fourth Circuit Court of Appeals erroneously applying the doctrine of res judicata prevents adjudication of an important issue in the realm of labor relations—whether or not an arbitrator's award, if induced directly or indirectly by fraud, threats or collusion, can be directly attacked in court by individual members of a local union operating under a collective

bargaining agreement which provides that such award is final—after exhausting their contractual remedy.

Petitioners were all members of a local union of the United Mine Workers of America. They could only be employed or remain employed subject to the provisions of the collective bargaining agreement in effect between the International Union and Consolidation Coal Company, their employer. That agreement provided grievance machinery which they were compelled to exhaust before their action in court would be entertained. *Henderson v Eastern Gas & Fuel Associates, (4th, 1961) 290 F. (2d) 277; Republic Steel Corporation v Maddox 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. (2d) 580.* It provided that the decision of the Umpire should be final. They now attack it upon the ground that the decision was caused or induced by an interplay of threats and collusion to cause and sustain their discharges between the parties authorized to conduct the grievance procedure.

The facts of mine union life in the extensive West Virginia and other Southern Appalachian coal fields provide little opportunity for adequate protection of the individual's rights if the grievance procedure, which the courts compel him to exhaust as a prerequisite of suit, is not fairly and honestly used by either party to the collective bargaining agreements. The representatives of the union who dominate grievance procedure and make decisions affecting the welfare of the indivdual miner are not attorneys chosen or employed by the individual miner to represent his interests. The prevailing practice is to exclude such representation. None of the process is very democratic and the processing is usually in hands of a small group of agents for the employer and of the top echelon of a giant union. These powerful leaders are involved in many collateral activities and interests that override the protection of an individual.

Admittedly loss of employment, of home, of automobile, or the suffering of other economic or social consequences is not the same thing as actual imprisonment or criminal stigma but in a day when the rights of an accused are emphasized and poverty programs designed to lift the lot of the individual poor, the union laborer should at least be accorded confidence in a system to which he is bound by his very willingness to work and perhaps his lack of capacity for some other trade.

The development of the issue set forth in the complaint in this case may be a proper vehicle for defining the limits of grievance procedure. What could be better than a case which involves two giants—Consolidation Coal Company and The United Mine Workers of America—to consider the *means* of decisions in the industrial field. The judgment of the Fourth Circuit—and its erroneous finding of res judicata based upon multiple unwarranted assumptions stands athwart that pathway—in a case where fraudulent inducement of an abritration award is charged as part of the violation of the collective bargaining agreement itself.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

D. Grove Moler
Box 357
Mullens, West Virginia
Attorney for Petitioners

APPENDIX A

(caption omitted)

KAUFMAN, District Judge:

Plaintiffs, nine former employees of Consolidation Coal Company (the Company) and members of Local 9690, United Mine Workers of America (the Union) brought this action in the United States District Court for the Southern District of West Virginia. Plaintiffs seek to recover damages for their alleged wrongful discharge by the Company in violation of the latter's collective bargaining agreement with the Union, and for the Union's alleged conspiracy with the Company in procuring by fraud a decision of the umpire under the grievance procedures of the union contract sustaining discharges of plaintiffs. The jurisdiction of the District Court was asserted under section 301(a) of the Taft-Hartley Act, 29 U.S.C.A. § 185(a).[1] Each of the defendants filed motions to dismiss.[2] The District Court in a

[1] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[2] The Company contended that the complaint failed to state a cause of action and was barred both by limitations and the doctrine of *res judicata*. The Union argued that the complaint failed to state a cause of action and was barred by *res judicata*, that the complaint was barred by limitations, that the District Court was without jurisdiction since the matters set forth in the complaint are within the exclusive jurisdiction of the National Labor Relations Board and also not within the subject matter under section 301(a), that the Union is an unincorporated association under West Virginia law and could not be sued in West Virginia since it is not a "jural entity," that the District Court had no jurisdiction over the Union or the subject matter of the action because the action could not be maintained against it under Rule 17 (b) of the Federal Rules of Civil Procedure, that diversity of citizenship was lacking between plaintiffs and defendants, that the complaint failed to allege the circumstances constituting fraud with the particularity required by Rule 9(b) of the Federal Rules, and that the complaint failed to state and contain a short and plain statement of the claim as required by Federal Rule 8(a) (2) showing that plaintiffs are entitled to the relief sought.

Memorandum Opinion dismissed the action as against all defendants on the ground that where a collective bargaining contract provides that a decision of the umpire in the arbitration of grievances shall be final, such a decision will be reviewed by the courts only where there is an allegation that the decision was procured by fraud and that plaintiffs' complaint did not state the circumstances constituting fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.[3]

Subsequent to the filing by the District Court of its Memorandum Opinion on April 4, 1966, plaintiffs filed a motion requesting leave to file an amended complaint. In their proposed amended complaint plaintiffs included certain amplifications with regard to the allegations of fraud. All defendants opposed plaintiffs' motion. The District Court found the factual allegations of the amended complaint were not materially different from those in the original complaint, denied plaintiffs' motion to amend, and ordered plaintiffs' original complaint dismissed with prejudice in accordance with its previously filed Memorandum Opinion.

Plaintiffs' suit is one for wrongful discharge and is grounded upon an alleged breach by the Company and the Union of the collective bargaining agreement. That agreement includes detailed grievance provisions for the handling of disputes relating to discharges and provides that a decision rendered by an umpire in the course of arbitration proceedings "shall be final." Plaintiffs allege that they submitted their claims pursuant to the grievance procedure, and that those claims were considered at the appropriate stage in this procedure by an umpire mutually agreed upon by the Company and the

[3] Federal Rule 9(b) provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. * * *"

Union. Plaintiffs further aver that the Company and the Union conspired fraudulently to obtain and induce a decision of the umpire affirming their discharges. Plaintiffs allege that the Company threatened Union representatives with reprisals against the Local and that because of such threats the Union withheld information from the umpire pertinent to the disposition of plaintiffs' grievances.

The District Court dismissed solely on the ground that plaintiffs failed to allege fraud with sufficient particularity. That Court did not consider any of the other grounds advanced by defendants in support of their motions to dismiss. The questions arise as to whether plaintiffs were entitled to file their proposed amended complaint as a matter of right and also whether the original or amended complaint failed sufficiently to particularize fraud. The view which we take of this case does not require us to reach either of those issues. Suffice it to say that the amended complaint alleges basically the same facts and raises essentially the same issues as the original complaint. Both defendants raised the defense of *res judicata* in their motions to dismiss, alleging that plaintiffs had previously instituted this same action in the Circuit Court of Wyoming County, West Virginia, and that that Court had dismissed the action. Plaintiffs contend that *res judicata* cannot properly be raised in the context of a motion to dismiss, an argument which we reject as against the weight of authority. *Jenson v. Olson*, 353 F.2d 825 (8th Cir. 1965); *Scholla v. Scholla*, 201 F.2d 211, 213 (D.C. Cir. 1953); *Larter & Sons, Inc.* v. *Dinkler Hotels Co.*, 199 F.2d 854, 855 (5th Cir. 1952); *W. E. Hedger Transp. Corp.* v. *Ira S. Bushey & Sons, Inc.*, 186 F.2d 236, 237 (2d Cir. 1951); *Hartman* v. *Time, Inc.*, 166 F.2d 127, 131, 137-38 (3d Cir. 1947).

There is no dispute concerning the facts in this case

which are relevant to the claim of *res judicata*. For the reasons stated herein we affirm the dismissal of plaintiffs' complaint and apply the doctrine of *res judicata*.

On February 21, 1964, the same nine plaintiffs herein instituted an action in the Circuit Court of Wyoming County, West Virginia,[4] against the same defendants herein. As in this case, both the complaint and the amended complaint later filed in the State Court allege that plaintiffs were wrongfully discharged from their jobs by the Company and that the decision of the umpire in arbitrating the dispute in connection with their discharges was fraudulently obtained by a conspiracy of the Company and the Union. Both complaints filed in the State Court, as well as the complaint filed by the plaintiffs in the District Court below and the proposed amended complaint in that Court, contain substantially the same factual allegations. And in the State Court, as here, plaintiffs sought to set aside and vacate the decision of the umpire and sought judgment for compensatory and punitive damages against defendants.

In the State Court the Company filed an answer to the complaint and a motion to dismiss and motion for summary judgment. The Union moved to dismiss the original complaint on the ground that as unincorporated associations neither the Local nor the International could be sued by name under West Virginia law. Plaintiffs voluntarily entered an order dismissing the unincorporated associations as such and, with leave of court, filed an amended complaint substituting as defendants named individual district and local officers and committeemen.[5]

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[4] Hereinafter referred to as the "State Court."

[5] The individual substituted defendants were George J. Titler, Harry T. Gibson, Douglas Lambert, Curtis Cordell (incorrectly named in the amended complaint as "Curtis Caudill") and Clarence Smith. It appears from the amended complaint in the State Court and from a supporting memorandum filed therein by plaintiffs that Lambert, Cordell and Smith were

To the amended complaint the Company filed an amended answer and also a motion to dismiss. The record before us does not reveal whether the Company filed any supporting legal memorandum. Two of the individually named union official defendants, Titler and Gibson, appeared specially and filed a motion to dismiss. Two other individually named union representative defendants, Lambert and Cordell, also appeared specially filing a joint and several motion to dismiss. The fifth individual defendant, Smith, made no appearance or motion in the State Court. Lambert and Cordell filed a legal memorandum in the State Court in support of their motion to dismiss. In addition to that memorandum, at least two legal memoranda were filed by plaintiffs in the State Court in opposition to the motions to dismiss.

On March 8, 1965, the State Court entered an order sustaining the motions to dismiss filed on behalf of the Company and the individual defendants and dismissing plaintiffs' action "as to all defendants. . . ." In its order the State Court assigned no reasons for the action it took, made no findings or conclusions, and filed no opinion.

On May 11, 1965, the nine plaintiffs petitioned to appeal to the Supreme Court of Appeals of West Virginia[5] and filed a lengthy supporting brief. On May 24, 1965, the State Supreme Court refused plaintiffs' petition for appeal without assignment of any reason. No review was sought by plaintiffs in the Supreme Court of the United States, although plaintiffs had urged throughout the

individual members of the Mine Committee of the Local Union who were charged with the responsibility of representing plaintiffs at two stages of the grievance procedure and who actively participated in that procedure. Titler and Gibson were District representatives of the Union who are alleged by plaintiffs in their amended complaint in the State Court to have represented plaintiffs in the grievance process at each stage.

[5] Hereinafter referred to as the "State Supreme Court."

State Court proceedings that their cause of action was grounded upon a federal statute—section 301(a) of the Labor Management Relations Act of 1947—and that state and federal courts had concurrent jurisdiction under that Act.[7] Plaintiffs instead instituted the instant action in the District Court on July 14, 1965.

Res judicata is a broad, judicially-developed doctrine under which the courts have sought to deal with the problems posed by the effects, if any, of a prior judgment on subsequent litigation. "The principle of res judicata fosters reliance on judicial action, and tends to eliminate vexation and expense to the parties, wasted use of judicial machinery and the possibility of inconsistent

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[7] It is completely clear that section 301(a) is both jurisdictional and substantive—that it gives federal courts jurisdiction while at the same time authorizing them "to fashion a body of federal law for the enforcement of . . . collective bargaining agreements. . . ." Textile Workers Union v Lincoln Mills, 353 U.S. 448, 451 (1957). The substantive law to be applied in suits under section 301(a) "is federal law which the courts must fashion from the policy of our national labor laws." *Id.* at 456; *accord,* Vaca v. Sipes, 386 U.S. 171, 174, 177 (1967). Jurisdiction of state courts over suits for violation of collective bargaining agreements is not, however, divested by section 301(a). Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). The jurisdiction of state and federal courts over suits for violation of collective bargaining contracts is concurrent. Humphrey v. Moore, 375 U.S. 335 (1964); Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). Where, however, litigation brought in a state court is "within the purview of § 301(a)," the substantive law which the state court must apply is federal. Local 174 v. Lucas Flour Co., *supra,* 369 U.S. at 102-04. "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute." *Id.* at 103. There is no doubt that a suit, such as the instant one, which charges the employer with a breach of the collective bargaining contract in wrongfully discharging employees and which charges the union with a violation of the duty of fair representation is a suit within the purview of section 301(a) and which is thus governed by substantive federal law. Vaca v. Sipes, *supra;* Humphrey v. Moore, *supra;* Smith v. Evening News Ass'n, 371 U.S. 195 (1962). Since any suit within the purview of section 301(a) will involve questions of federal labor law, a party to such a suit may petition for certiorari to the United States Supreme Court. See, *e.g.,* Local 174 v. Lucas Flour Co., *supra,* 369 U.S. at 98.

results.'"[8] The general rule in regard to cases where, as here, a defendant has prevailed in a former action is stated in the *Restatement of Judgments*[9] as follows:

> Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action [*Restatement* § 48.]

The rationale behind this rule is embodied in the determination and desire to put an end to litigation once it has reached a terminal point. As expressed in the *Restatement* (§ 1 Comment a):

> If a party has been successful in obtaining a judgment in his favor, he should not ordinarily be subjected to further litigation with respect to matters determined by the judgment; if a party after a full opportunity to be heard has been unsuccessful in obtaining a judgment upon a claim or in defending a claim against him, it is not unfair that he should be deprived of the privilege of further litigation with respect to matters determined by the judgment. If the State has afforded an opportunity to the parties to litigate their claims and a final judgment has been rendered, it is to the public interest that they should not be permitted to relitigate the same matters.

Of particular pertinence to the present action is the principle that a former judgment will be binding even

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[8] *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952).

[9] *Restatement of Judgments* (1942). Hereinafter referred to as *"Restatement."*

though it may have been erroneous.[10] A litigant who has not fully exhausted his rights in a former action or who having exhausted them, seeks to bring that action anew and be heard again from the beginning, has already once "had his day in court and he is not entitled to another opportunity to present his claim or defense." *Restatement* § 1 Comment b.

When viewed against the background of these principles, the cause of action which plaintiffs are seeking to maintain in the federal courts on this appeal has all of the hallmarks of a cause of action long since expired. Plaintiffs' initial grievances, their allegedly wrongful discharges, were first aired before the umpire pursuant to the collective bargaining agreement. When the umpire rendered an unfavorable decision, plaintiffs filed charges with the National Labor Relations Board in a series of cases. The Board in each instance refused to issue a complaint.[11] Though a refusal of the National

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[10] "The fact that the judgment was erroneous does not preclude the defendant from relying upon it as a bar in a subsequent action brought by the plaintiff on the original cause of action. If it was erroneous, the plaintiff might have taken steps to have it set aside or reversed in the original proceeding. If he has not done so, or if his attempt to do so was unsuccessful, he cannot thereafter collaterally attack it." *Restatement* § 48 Comment a.

[11] The following account of the disposition of the charges filed with the NLRB is set forth in the Company's answer to plaintiffs' original complaint in the State Court:

> Plaintiffs, through their attorney, D. Grove Moler, on February 15, 1963, filed with the National Labor Relations Board of the United States of America, in Case No. 9-CA-2795, "Charge Against Employer", charging Consolidation Coal Company with unfair labor practices in that the company discharged the plaintiffs named in this complaint in order to discourage their membership in, and activities on behalf of, the United Mine Workers of America, and that the employer had also interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them under the National Labor Relations Act. On June 26, 1963, the Regional Director, John C. Getreu, refused to issue a complaint as there was insufficient evidence of violation of the act, which decision was not appealed. * * *

Labor Relations Board to issue a complaint does not constitute an adjudication for purposes of applying the doctrine of *res judicata* in a subsequent court action

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Also, on the 13th day of March, 1963, D. Grove Moler, attorney, on behalf of the plaintiffs named in this complaint, filed with the National Labor Relations Board of the United States of America, in Case No. 9-CB-1098-1, against Local Union 9690, United Mine Workers of America, and Case No. 9-CB-1098-2, against District 29, United Mine Workers of America, charges stating that Local Union 9690, by its Grievance Committee, caused and attempted to cause Consolidation Coal Company to discriminate against the plaintiffs in this complaint and aided and abettered in the discharge of the plaintiffs in this complaint by omitting to provide adequate and proper representation in the processing of contractual grievance procedure and counseling and permitting said plaintiffs in this complaint to omit valid and substantial de[illegible] and permitting the employer to make up an improper "loaded" [illegible]nst the plaintiffs named in this complaint. The charge against District 29, United Mine Workers of America, was substantially the same as that against Local Union 9690, United Mine Workers of America. On April 3, 1963, the Regional Director, John C. Getreu, found insufficient evidence of violation, and upon review it was found that further proceedings were deemed unwarranted, which decision was not appealed. * * *

On April 19, 1963, Ted Q. Wilson, attorney, on behalf of Charles Taylor and the other eight plaintiffs named in this complaint, filed with the National Labor Relations Board of the United States of America charges in Case No. 9-CA-2839, Consolidation Coal Company, Case No. 9-CB-1116-1, Local 9690, United Mine Workers of America, and Case No. 9-CB-1116-2 District 29, United Mine Workers of America, charging Consolidation Coal Company with discharging Charles Taylor and the eight other plaintiffs named in this complaint for sympathies and activities on behalf of the Southern Labor Union and coercing its employees; charging Local 9690, United Mine Workers of America with causing Consolidation Coal Company to discriminate against Charles Taylor and the eight other named employees in this complaint by failing to represent the said nine plaintiffs named in this complaint when they were discharged; and charging District 29, United Mine Workers of America with assisting Consolidation Coal Company in discriminating against the nine plaintiffs named in this complaint and also failure to represent them. On April 30, 1963, these charges were all amended but made practically the same charges with reference to the period beginning January 2, 1963. On June 26, 1963, again the Regional Director, John C. Gertreu found insufficient evidence of violation. On review on October 2, 1963, the Board found further proceedings were deemed unwarranted, which decision was not appealed. * * *

under section 301,[12] the series of charges filed by plaintiffs with the Board and the failure of the Board to issue any complaint in connection with those charges in this instance serve to highlight the opportunities which have been available to plaintiffs to have their grievances authoritatively adjudicated. Failing in their attempts to cause the Board to issue a complaint, plaintiffs next instituted suit in the State Court. The detailed and lengthy memoranda filed by plaintiffs in that action show that plaintiffs not only were afforded, but indeed took advantage of, every "fair opportunity to litigate a claim before a court which [had] jurisdiction over the parties and the cause of action."[13] Having failed in their efforts in the trial and highest courts of the State of West Virginia, plaintiffs elected not to seek review in the United States Supreme Court and opted instead to reinstitute their action in the District Court, a tribunal whose jurisdiction over the action involved was concurrent with that of the State Court. It seems to us rather fundamental that this last in the series of actions taken by plaintiffs requires application of the doctrine of *res judicata*. However, no matter how closely any given case may seem to conform to the necessities out of which the doctrine of *res judicata* has grown, that doctrine is a technical instrument of the judicial craft and certain rules must be carefully followed in the application of the instrument. The rule which is relevant to the instant case

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[12] The fact that an unfair labor practice (in regard to which the NLRB might issue a complaint) does or does not exist is largely irrelevant to a party's right to maintain suit under section 301(a). See Vaca v. Sipes, *supra*, 386 U.S. at 176-88; Carey v. Westinghouse Corp., 375 U.S. 261, 268 (1964); Humphrey v. Moore, supra, 375 U.S. at 344 In addition, professor Davis has stated, citing N.L.R.B. v Baltimore Transit Corp, 140 F.2d 51 (4th Cir. 1944), that "a refusal by the National Labor Relations Board to file a complaint is not a final decision on the merits and is not res judicata. . . ." 2 K.DAVIS, ADMINISTRATIVE LAW TREATISE § 18.06, at 584-85 (1958). See also *id.* § 18.03, at 559.

[13] *Restatement* § 1 Comment c.

has been stated above in the quotation from the *Restatement* dealing with the effect of a former judgment in favor of the defendant upon a subsequent attempt by the plaintiff to reinstitute the same cause of action.[14] Embraced within that rule are certain definite requirements which must be met before the rule will bar the subsequent suit. Briefly stated, these are: (1) The former judgment must have been both valid and final; (2) The cause of action asserted in the subsequent litigation must be the same cause of action as was asserted in the former litigation; (3) The former judgment must have been rendered on the merits; and (4) The parties to the former judgment must stand in such relationship to the parties to the subsequent action as to entitle the latter to the benefits and subject them to the burdens of the prior litigation.[15] Plaintiffs in this case have argued that only one of those requirements is not met, namely that the State Court judgment was not rendered on the merits, and that for that reason the doctrine of *res judicata* does not bar their suit herein. We find that both the first (i.e., validity and finality) and the second (i.e., the same cause of action) of the above requirements are clearly

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[14] See *Restatement* § 48, quoted above.

[15] We know of no federal law doctrine with regard to *res judicata* which differs from that stated by the *Restatement*. Further, West Virginia case law would seem clearly in accord with the *Restatement's* enunciation of the elements of *res judicata*. There is thus no question present in this case concerning whether federal or West Virginia principles of *res judicata* would apply if they were differing, though federal law has been held to govern generally where section 301 is concerned. Local 174 v. Lucas Flour Co., *supra*, 396 U.S. 95. The West Virginia Supreme Court of Appeals, citing Bouvier's Law Dictionary, has stated that "to make a matter res adjudicata there must be a concurrence of four conditions, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the persons for and against whom the claim is made" Marguerite Coal Co. v. Meadow River Lumber Co., 98 W.Va. 698, 702, 127 S.E. 644 (1925). See also Barnett v. Wolfolk, 149 W.Va. 246, 140 S.E.2d 466 (1965), and cases cited therein. All of these factors are embraced within the four requirements as we have stated them in the body of this opinion.

met in this case. We also find that the third and fourth of those requirements—dealing respectively with whether or not the judgment of the State Court was on the merits and with the relationship of the parties in the State Court and District Court actions—have been met. However, we consider it advisable to set forth our reasons with regard to the third and fourth requirements in some detail.

The Dismissal in the State Court as a Judgment on the Merits

A dismissal of a cause of action may constitute a judgment on the merits depending upon the grounds upon which such dismissal is based. The West Virginia trial and highest courts assigned no specific reason for the actions they took. The absence of a written opinion does not, however, prevent application of the doctrine of *res judicata*. *Napa Valley Elec. Co.* v. *Railroad Comm.*, 251 U.S. 366, 373 (1920); *Saint Lo Construction Co.* v. *Koenigsberger*, 174 F.2d 25, 27 (D.C. Cir. 1949). The pleadings in the prior action are available to show what matters were in fact litigated and determined in the prior litigation. See *Restatement* § 68 Comment k.

The motions to dismiss the amended complaint in the State Court action reveal that the defendants therein set forth a total of fifteen grounds. We deem it advisable to consider each of those fifteen proposed grounds for dismissal.

(1) The Company urged that the State Court suit was not a proper appeal from the arbitration award and that plaintiffs had no right to move to set aside the arbitration award. A dismissal on either of these grounds would clearly be on the merits.

(2) All of the individual defendants filing motions to dismiss contended that the State Court suit was barred

under the doctrine of *res judicata*. Again, a dismissal on this issue would be on the merits, even though it would have been erroneous.[16]

(3) The individual defendants also pleaded that plaintiffs' suit in the State Court was barred by limitations. Again, an affirmative holding dismissing on the basis of this defense would be on the merits.

(4) Two of the individual defendants argued that plaintiffs were estopped from bringing suit on the ground that one of the plaintiffs had appeared and participated in the arbitration procedure in his own behalf and on behalf of the other plaintiffs. This ground, if adopted by the State Court, would go to the merits.

(5) Two of the individual defendants urged that the umpire was an indispensable party, the lack of whose presence prevented the State Court from rendering a final judgment. The possibility that this defense was accepted by the West Virginia trial or appellate courts is so unlikely that we can ignore it.[17]

(6) The Company contended section 301 of the NLRA is limited to disputes between employers and unions and consequently individual employees cannot maintain suit thereunder in their own names. If such a position had

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[16] A judgment on the merits is *res judicata* even though erroneous. *Restatement* § 48 Comment a, cited at note 10 *supra*. The plea of *res judicata* in the State Court was apparently in reference to the fact that the National Labor Relations Board had on several occasions refused to issue complaints in connection with charges filed by the nine plaintiffs. As stated above, a refusal of the Board to issue a complaint does not constitute an adjudication for purposes of applying the doctrine of *res judicata* in a subsequent court action. See note 12 *supra*.

[17] We have not been directed to nor have we found any case holding that an arbitrator is a necessary party to a suit in which the validity of the arbitration award is in question. Indeed, the law in West Virginia, as elsewhere, seems clear that the arbitrator is not a necessary party to such a suit. See Simmons v. Simmons, 85 W.Va. 25, 34-35, 100 S.E. 743, 748 (1919).

been accepted by the State Court as a ground for dismissal, the determination would be on the merits, even though erroneous.[18]

(7) The Company urged the plaintiffs' sole cause of action, if any, was against the Union for breach of its fiduciary duty. A dismissal by the State Court on this ground would bar institution of this suit as against the Company but would not operate as a bar against the Union. See *Restatement* § 49 Comment a, § 50 Comments b and d. The Supreme Court of Appeals of West Virginia had, however, prior to the State Court action, held that individual employees may maintain suit against their employer for a violation by the employer of a collective bargaining agreement. *Pettus* v. *Olga Coal Co.*, 137 W. Va. 492, 72 S.E.2d 881 (1952). Moreover, that same court had also held prior to institution of the State Court suit that an arbitrator's award which is fraudulent or induced by fraud may be reviewed and set aside by the courts. *Dickinson* v. *C. & O. R.R. Co.*, 7 W. Va. 390, 429-30 (1874). Thus it appears highly unlikely that the State Court would have dismissed the action as to both the Company and the individual defendants on the ground that plaintiffs' sole cause of action was against the Union.

(8) Two of the individual defendants in the State Court proceeding, Lambert and Cordell, moved to dismiss on the ground that they were not necessary, proper or indispensable parties to that action. A dismissal on that ground as to those individual defendants would constitute a judgment on the merits as to those in-

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[18] See notes 10 and 16 *supra*. A holding that individual employees cannot maintain suit in their own names under section 301 would clearly be erroneous. See Humphrey v. Moore, *supra*, 375 U.S. 335; Smith v. Evening News Ass'n, *supra*, 371 U.S. 195.

dividuals, but plaintiffs would not thereby be deprived of their right to maintain suit against all parties who were necessary, proper or indispensable. Plaintiffs cannot, however, rely herein on the possibility that the State Court's dismissal as to those two defendants was on that basis in order to escape the effect of *res judicata* in a suit against the Union (standing in the shoes of the remaining three individual defendants) and the Company. The ground of such dismissal as to the two individual defendants could not be applicable to or explain the dismissal as to the Company or as to the remaining individual defendants and therefore does not eliminate the possibility that the dismissal as to the Company and the remaining three individual defendants was on the merits.

(9) The same two individual defendants referred to above under (8) moved to dismiss on the ground that they were not parties to the fraud alleged in plaintiffs' amended complaint in the State Court. Again, however, while a dismissal on that ground would constitute a judgment on the merits as to them, such a ground could not have been the basis for the dismissal as to the Company and the remaining three individual defendants, two of whom, Titler and Gibson, were more specifically alleged in plaintiffs' amended complaint in the State Court to be directly involved in the alleged fraudulent conspiracy.

(10) The defendants Titler and Gibson moved to dismiss because of alleged misjoinder of parties. A dismissal for that reason would be a dismissal on the merits as against those two defendants if they were the misjoined parties.[19] However, since the fraud allegations against them were clearly alleged in the State proceedings, Titler

[19] See the discussion under (12) *infra*.

and Gibson certainly were not misjoined parties. A dismissal of other misjoined individual defendants would still leave the dismissal of Titler and Gibson to be explained on additional grounds and would thus result in the *res judicata* status insofar as the Union (standing in the shoes of Titler and Gibson) is concerned.[20] The possibility of a dismissal for misjoinder of the Company is one we discard completely.[21]

(11) Two of the individual defendants, Titler and Gibson, moved to dismiss on the ground that plaintiffs' complaint did not state a cause of action against them. If the State Court's dismissal was a holding by that Court that plaintiffs could in no case state in their complaint facts sufficient to constitute a cause of action, such dismissal would be a judgment on the merits and *res judicata* herein. *Restatement* § 50 Comment c. In any event, we find it extremely unlikely that the State Court found the amended complaint before it demurrable in any respect. In comparing plaintiffs' amended complaint in the State Court with the complaint filed in the District Court, we find no allegations, which might conceivably be regarded as essential, which exist in the latter and are missing or lacking from the former.

(12) The Company asserted that plaintiffs were not entitled to sue as beneficiaries of the contract between it and the Union unless both parties to the contract, i.e., both the Company and the Union, were before the Court. If the State Court had based its dismissal on the ground that both the Company and the Union were necessary parties to the action, that decision would be *res judicata* in a subsequent action to the extent that plaintiffs could not relitigate without joining both the Union and the

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[20] See the discussion under (8) *supra.*

[21] See the discussion under (7) *supra.*

Company. *Restatement* § 49 Comment b, § 50 Comment d. But plaintiffs would not be barred by such a decision in the State Court from bringing an action against all of the parties determined in the State Court to be necessary to the action. A cause of action is not extinguished where a dismissal is based on misjoinder or nonjoinder of parties. *Restatement* § 49 Comment a. Thus, if the dismissal by the State Court was on the ground that the Union was a necessary party to any suit on the collective bargaining contract, such a defect in the plaintiffs' action in the State Court is cured herein by the joinder of the Union and the Company as parties defendant and would not operate to bar the present action.

We do not believe, however, that the State Court dismissed the State-Court complaint on the ground that the Union was a necessary party to the action. In *Pettus* v. *Olga Coal Co., supra,* twenty-four employees of a coal company brought suit against the company, in equity, for recovery of a sum alleged to be due them because of a breach by the company of a provision relating to a thirty-minute lunch period in the collective bargaining contract. The union was not joined as a defendant. The West Virginia trial court dismissed the case. The Supreme Court of Appeals of West Virginia affirmed the dismissal on the ground that the provisions of the contract relating to arbitration had not fully been complied with. That court, however, reached the question of whether or not the employees had a right to maintain a suit of that nature against their employer. The right of the employees to maintain the action, said the court, depended "upon what position they occupy with reference to the contract." 137 W.Va. at 496, 72 S.E.2d at 883-84. The court framed its answer to this matter in terms of a third-party beneficiary approach. In the first place it held that the employees could not avail them-

selves of a West Virginia statutory provision[22] relating to third-party beneficiaries. On this point the court held that the statute applied only to persons who were "sole beneficiaries" of a promise or covenant, and that since the collective bargaining contract was for the benefit of both the employees and the union itself, the employees alone could not maintain suit as third-party beneficiaries under the statute. Secondly, the court held that the statute applied only to legal "actions" and could not be relied upon by the employees to support their suit in equity. The court then went on to hold that the employees were third-party "creditor" beneficiaries at common law and were entitled to maintain the suit under a state common-law doctrine that third-party creditor beneficiaries have a substantive right to recover against a contractual promisor by a suit in equity.

Implicit in the court's holding in *Pettus* is the proposition that individual employees may bring suit upon a collective bargaining agreement in their own names as third-party beneficiaries against one party to that contract without joining the other party to the contract as a defendant. The court in *Pettus* did not directly refer to the question of the absence of the union as a party to that suit, but the clear effect of its holding is to allow individual employees to maintain a suit in their own right against the company which employs them, and to do so in the absence of the union as a party to the proceedings, under the theory that such employees are suing as third-party beneficiaries. The plaintiffs in this case clearly were suing the Company as third-party bene-

[22] "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." 13 W.Va. Code Ann. § 55-8-12 (1966).

ficiaries of the collective bargaining contract. Thus, under the *Pettus* holding the Union was not an indispensable party defendant to that suit.

The West Virginia Supreme Court stated in *Pettus* that the employee plaintiffs as creditor beneficiaries of the union contract could maintain their suit in equity for damages, citing *Aetna Ins. Co.* v. *Maxwell,* 89 F.2d 988, 994 (4th Cir. 1937). In the *Maxwell* case this Court construed West Virginia law to permit suits in equity, but not in law, by creditor beneficiaries. After the *Pettus* and *Maxwell* decisions and before the commencement of the State Court action herein, West Virginia abolished all procedural distinctions between law and equity.[23] The *Pettus* rule would therefore seem applicable to the State Court proceeding herein in which plaintiffs, without any indication of whether they were seeking legal or equitable relief, sought damages as did the plaintiffs in *Pettus.*

(13) The individual defendants urged in the State Court that the complaint failed to allege the circumstances constituting the alleged fraud with particularity as required under the West Virginia Rules of Civil Procedure.[24] If the State Court's dismissal had been based on the ground that plaintiffs' complaint in that proceeding did not allege fraud with sufficient particularity that dismissal would be considered as a judgment for the defendants therein which was not on the merits. Plaintiffs' cause of action would not be extinguished by such a dismissal since it would not be based on a ground "involving the substance of the plaintiff's cause of action. . . ." *Restatement* § 49 Comment a. Plaintiffs would be entitled to cure the defect in

[23] "There shall be one form of action to be known as 'civil action'; all procedural distinctions between actions, suits and other judicial proceedings at law or in equity and in the forms of actions are abolished." W.VA. R. CIV. P. 2, 3 W. VA. CODE ANN. (1961).

[24] W. A. R. CIV. P. 9(b), 3 W. VA. CODE ANN. (1961).

the pleading by alleging fraud with the requisite specificity and proceed to reinstitute the action. As it stated in the *Restatement:*

> Even though the judgment for the defendant is based upon the failure of the plaintiff to state in his complaint facts sufficient to constitute a cause of action, the plaintiff is not necessarily precluded thereby from maintaining an action on his original cause of action. If his complaint in the later action contains further allegations, the omission of which made the complaint in the first action demurrable, the judgment in the first action is not a bar to the second action, although (see Comment *e*) he has failed to avail himself of permission to amend. Thus, if in an action for breach of contract a demurrer to the complaint is sustained on the ground that the plaintiff failed to allege consideration, he is not precluded from bringing a new action in which the complaint contains an allegation of consideration. Similarly, if in an action for slander a demurrer to the complaint is sustained because of the failure of the plaintiff to allege special damages, he is not precluded from maintaining a new action upon a complaint in which special damages are alleged. [*Restatement* § 50 Comment c].

If the State Court dismissed the complaint in the State Court proceedings on the ground that fraud was not alleged with sufficient specificity, plaintiffs nevertheless would not be entitled to bring the within subsequent complaint if the latter again failed to set forth the circumstances constituting fraud with sufficient specificity. "[I]f judgment for the defendant was rendered on a demurrer to the complaint in which a necessary allegation was omitted, and the plaintiff brings a new action in which the complaint is substantially the same as in the

prior action, the plaintiff is not entitled again to litigate the question whether the complaint is sufficient." *Restatement* § 50 Comment d. A dismissal on the ground that fraud was not alleged with sufficient specificity would be *res judicata* as to that matter and a complaint filed in a subsequent suit which alleged fraud with only the same degree of specificity would be barred. See *Restatement* §50 Comment d.

The question thus arises as to the degree of specificity with which fraud was alleged in the amended complaint filed by plaintiffs in the State Court as compared with the complaint filed in the District Court. In comparing the two complaints it is apparent that the allegations of fraud are practically the same in each. Both charge the substance of the alleged fraud—an alleged conspiracy between the Union and the Company to procure an arbitration decision unfavorable to the plaintiffs—and the facts alleged in both complaints to support the fraud charge are almost the same. We thus find that plaintiffs' complaint in the District Court is, in the words of the *Restatement,* "substantially the same as [the complaint] in the prior action" insofar as the allegations of fraud contained therein are concerned. We reach the same conclusions in comparing plaintiffs' amended complaint in the State Court with plaintiffs' proposed amended complaint in the District Court below (which, as we have noted above, does not materially differ from the original complaint filed by plaintiffs in the District Court). Therefore, assuming that the dismissal by the State Court was based on the ground that plaintiffs had not in their complaint alleged the circumstances constituting fraud with sufficient particularity, plaintiffs have failed to cure that defect in the complaint filed herein and, upon that assumption, would be barred from bringing this action under the principles of *res judicata.*

(14) The Company set forth as a ground in support of its motion to dismiss in the State Court the proposition that the exclusive jurisdiction over plaintiffs' cause of action lay in the federal courts. Similarly, two of the individual defendants, Lambert and Cordell, pleaded that plaintiffs' action therein was not cognizable in the courts of West Virginia. A dismissal by the State Court, if based on these grounds, would constitute a dismissal for lack of subject-matter jurisdiction and would not foreclose plaintiffs from reinstituting the action in a court which had jurisdiction over the subject-matter, in this case the District Court. *Restatement* § 49 Comment a.

We do not believe that the State Court dismissed plaintiffs' complaint on the ground that exclusive jurisdiction over such actions lay in the federal courts. At the time of the entry of the order dismissing that complaint, on March 8, 1965, the law was well-settled that the jurisdiction of state and federal courts over causes of action cognizable under section 301 (a) was concurrent. *Humphrey v. Moore,* 375 U.S. 335 (1964); *Local 174 v. Lucas Flour Co.* 369 U.S. 95 (1962); *Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962).[25]

[25] In their briefs in this appeal counsel for all the parties have argued the applicability of Angel v. Bullington, 330 U.S. 183 (1947), to the facts of the instant case. There Bullington, a Virginia citizens, instituted suit against Angel, a citizen of North Carolina, in a North Carolina state court to recover a deficiency judgment in a mortgage foreclosure procedure in connection with property sold in Virginia. A North Carolina statute declared that no such deficiency judgment could be obtained. Bullington argued on appeal in the Supreme Court of North Carolina that "the United States Constitution precluded North Carolina from shutting the doors of its courts to him" (330 U.S. at 185), but that court held that Bullington's suit was barred by the statute. Bullington did not seek review by appeal or certiorari to the United States Supreme Court but instead reinstituted the same cause of action in a federal District Court sitting in North Carolina. The District Court gave judgment for Bullington. The Supreme Court of the United States held in reviewing that judgment that Bullington's suit in the District Court was barred by *res judicata.* In our view the decision of the United States Supreme Court in

(15) Two of the individual defendants, Titler and Gibson, argued in support of their motion to dismiss that exclusive jurisdiction of the subject matter of plaintiffs' complaint lay in the National Labor Relations Board. Ordinarily a decision on such ground, even if erroneous, would constitute a binding adjudication as to a point of law and would bar subsequent reinstitution of the action. But such a decision would pre-empt not only the jurisdiction of the state court but jurisdiction of the federal court as well. In a case directly in point, it was held that a federal court would not recognize as binding upon it a prior decision by a state court that the National Labor Relations Board possessed exclusive jurisdiction over the subject matter of a plaintiff's action. *Kipbea Baking Co. v. Strauss,* 218 F. Supp. 696 (E.D.N.Y. 1963).

We do not, however, believe that the State Court in this case dismissed plaintiffs action on the ground that exclusive jurisdiction over that action lay with the Board. Prior to the State Court action, the United States Supreme Court had clearly held that suits may be maintained in either the state or federal courts under section 301 (a) even though the subject matter of such suits might constitute an "unfair labor practice" over which the Board might have jurisdiction. *Carey v. Westinghouse Elec. Corp.,* 375 U.S. 261, 268 (1964); *Humphrey v. Moore, supra,* 375 U.S. at 344; *Smith v. Evening News*

Angel has no applicability to the facts of the instant case. See Kipbea Baking Co. v. Strauss, 218 F. Supp. 696, 698-99 (E.D.N.Y. 1963). In *Angel,* which was a diversity action, the North Carolina Supreme Court sustained the validity of a North Carolina statute which barred Bullington from maintaining his suit. In view of the cases cited above in the text which hold that the state and federal courts have concurrent jurisdiction over causes of action cognizable under section 301(a), we are convinced that the State Court in this case did not dismiss plaintiff's complaint on the ground of lack of existence of such jurisdiction in the State Court.

Ass'n, 371 U.S. 195, 197-98 (1962). Plaintiffs' complaint does not present a situation in which any serious problem would arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, a problem alluded to by Mr. Justice White in the *Smith* case. 371 U.S. at 197-98. In view of the state of the law on the subject at the time the State Court dismissed plaintiffs' action, we do not consider that its dismissal was based on this ground.

Having reviewed all of the fifteen grounds of dismissal raised by the defendants in the State Court action and having not discovered or been referred to any other additional explanation for such dismissal, we conclude that the State Court's dismissal constitutes a judgment on the merits.

The Relationship of the Parties

Ordinarily the only persons who will be bound or will benefit by a final personal judgment rendered on the merits will be those persons who were parties to that action. Having determined that the State Court's dismissal was a judgment on the merits and that all of the other requirements of the doctrine of *res judicata* exist in regard to the instant action, it is necessary to consider whether the parties now before the Court are persons affected by the State Court's dismissal. With regard to the Company, there is no difficulty. Both it and the present plaintiffs were parties of record to the State Court action. Plaintiffs are thus barred by the dismissal therein from reinstituting this action against the Company.

The question arises, however, as to whether or not the Union is entitled to the benefit of the State Court dismissal of the individual defendants. We determine that it is.

The *Restatement* sets forth the following rule:

> A valid judgment on the merits and not based on a personal defense, in favor of a person charged with the commission of a tort or a breach of contract, bars a subsequent action by the plaintiff against another responsible for the conduct of such person if the action is based solely upon the existence of a tort or breach of contract by such person, whether or not the other person has a right of indemnity. [*Restatement* § *99*].[26]

We find that rule to be controlling here. Plaintiffs can prevail in the instant suit against the Union only if they prove that the officials and representatives of the Union who represented them in the grievance procedure subsequent to their discharge acted fraudulently. In their suit against those officials and representatives in the State Court, plaintiffs have had their day in court

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[26] In the situations with which the *Restatement* rule is concerned "the person against whom the rule works adversely has had his day in court and it is not unfair that if he is unsuccessful in his action against the alleged tort-feasor or contract breaker, he should be deprived of an action against another, even though the other would have no right of indemnity against the defendant in the first action were judgment rendered against him." *Restatement* § 99 Comment a. The principle which underlies the rule has also been stated as follows: "An almost universal exception to the requirement of mutuality is found where the liability of the defendant in the later action is based soley upon a culpable act of another. Where the immediate actor has already been found not liable, it has seemed unfair to permit further litigation which might result in liability being imposed upon the defendant, despite the fact that the jury might have erred in the first suit." *Developments—Res Judicata, supra,* 65 HARV. L. REV. at 862-63. The West Virginia cases which discuss *res judicata* have for the most part been cases involving assertions of *res judicata* in connection with prior adjudications between other plaintiffs and the same defendants. E.g., Barnett v. Wolfolk, *supra,* 149 W.Va. 246, 140 S.E. 2d 466; Gentry v. Farruggia, 132 W.Va. 809, 53 S.E.2d 741 (1949); *but see* Collins v. Treat, 108 W.Va. 443, 152 S.E. 205 (1930). In this case the prior adjudication concerns the same plaintiffs and agents of the defendant Union. We have found no federal, West Virginia or other case law contrary to the position stated by the *Restatement* and by the Harvard Law Review Developments Note with regard to the factual situation which confronts us in this case.

and being unsuccessful therein it is not unfair that they should be denied in the District Court an action against the Union.

In conclusion, we hold that the dismissal by the State Court of plaintiffs' complaint was a judgment on the merits which bars this action against the defendants herein, under the doctrine of *res judicata.*

Affirmed.

APPENDIX B

(caption omitted)

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition of the appellants, John Thomas, et al, for a rehearing, the court finds no ground asserted therein which was not considered upon the initial argument of this case, and for the reasons stated in its opinion heretofore filed, the court adheres to its original decision herein.

Wherefore, it is ordered that the said petition be, and it is hereby, denied.

Clement F. Haynesworth, Jr.
United States Circuit Judge

Albert N. Bryan
United States Circuit Judge

Ted A. Kaufman
United States District Judge

APPENDIX C

(caption omitted)

ORDER

This day came the plaintiffs, by their attorney, D. Grove Moler, the defendants, Consolidation Coal Company Coal Company, by its attorneys, John W. Gillespie and Robert Bailey, and the individual defendants, by their attorneys, James K. Edmundson and Mose E. Boiarsky, in pursuance of the motion to dismiss filed on behalf of Consolidation Coal Company and the motions to dismiss filed on behalf of the individual defendants, and the court, after an examination into the pending motion, was of the opinion to sustain each of said motions,

It is adjudged and ordered that said motions be sustained, that said action be dismissed as to all defendants, and that they recover of and from the plaintiffs their costs expended, to which ruling the plaintiffs, by their attorney, excepted.

ENTER:

R. M. Worrell
Judge

APPENDIX D

(caption omitted)

COMPLAINT

1. Plaintiffs are citizens of West Virginia, excepting John Thomas, Ray Trantham and Isaac Sizemore, who currently reside in Delaware and Lee Looney, currently residing in Virginia. Defendant, Consolidation Coal Company, is a corporation created under the laws of the State of Pennsylvania. Defendant, International Union, United Mine Workers of America, is a labor union, a voluntary joint association, with headquarters in Washington, District of Columbia. Defendant, Local Union No. 9690, United Mine Workers of America, is a local union, a voluntary unincorporated association, with headquarters at Itmann, Wyoming County, West Virginia.

Jurisdiction is founded herein upon Chapter 120, Title III, Section 301, 61 Statutes 156; 29 U.S.C.A. 185(a). The action is for violation of a collective bargaining agreement and contracts between an employer and labor organizations representing employees in the coal mining industry, which affects interstate commerce, as defined in Chapter 7, United States Code 1964.

2. Prior to September 21, 1962, a collective bargaining agreement was in force and effect between the defendant Consolidation Coal Company, a corporation (and by its predecessor at Itmann, Wyoming County, West Virginia, the Pocahontas Fuel Company, a corporation, now merged or identified with the said defendant as "Pocahontas Fuel Company Division"), as one of a group of bituminous coal operators and the defendant The International Union, United Mine Workers of America, an unincorporated association, (District 29) which is com-

prised of local unions and individual members under district supervision and control (the Local Union involved in this case being Local Union No. 9690, at Itmann, West Virginia, and the district here involved being District 29, with headquarters at Beckley, West Virginia), which said collective bargaining agreement contains, in part, the following provisions:

"MANAGEMENT OF MINES

The management of the Mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the Operator, and the United Mine Workers of America shall not abridge these rights. It is not the intention of this provision to encourage the discharge of Mine Workers, or the refusal of employment to applicants because of personal prejudice or activity in matters affecting the United Mine Workers of America.

DISCHARGE CASES

When a Mine Worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case arising under the method of settling disputes herein provided. In all discharge cases should it be decided under the rules of this Agreement that an injustice has been dealt the Mine Worker, the operator shall reinstate and compensate him at the rate based on the earning of said Mine Worker prior to such discharge. Provided, however, that such case shall be taken up and disposed of within five days from the date of discharge.

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Should difference arise between the Mine Workers and the Operators as to the meaning and application

of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately.

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

MISCELLANEOUS

1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "Penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

2. Any and all provisions of any contracts or agreements between the parties hereto or some of them whether National, District, Local or otherwise providing for a protective wage clause and a modification of this Agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void.

3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry."

The collective bargaining agreement referred to, and from which foregoing sections are quoted, is referred to as the National Coal Wage Agreement, as amended to date, and which incorporates non-conflicting and unrepealed provisions of prior wage agreements.

3. Each of the plaintiffs, namely, John Thomas, William McCoy, John Salters, Isaac Sizemore, Ray Trantham, Ellis Coleman, Jr., Lee Looney, John Yates and Charles Taylor, was, prior to September 21, 1962, employed by defendant's predecessor, Pocahontas Fuel Company, Inc., a corporation, at the Itmann, West Virginia, mine, and as part of the employment contract entered into by said employer with each of said plaintiffs, the said collective bargaining agreements were incorporated therein. The said plaintiffs thereby became employees under a continuing employment contract, and under the terms and conditions of said collective bargaining agreements made and executed for their benefit, and the defendant, Consolidation Coal Company, a corporation, as successor to their said prior employer at the Itmann mine, succeeded to, accepted and ratified the said employment contract and the existing relationship with each of the plaintiffs under the said collective bargaining agreement, including the amendments thereof.

Said employees constitute a group or class of persons entitled to be joined as plaintiffs herein under authority of Federal Rules, Civil Procedure, 20(a).

4. On the 24th day of September, 1962, defendant, Consolidation Coal Company, a corporation, hereinafter referred to as the "Company" gave each of the plaintiffs, although each plaintiff was ready, willing and able to perform his work under the contract, a written notice that he was discharged as an employee of the Company at its Itmann, West Virginia mine, (which is located in Wyoming County, West Virginia) but that it would permit said dischargees to work under protest until the discharges were approved by recourse to the grievance or arbitration procedure provided for in the said existing collective bargaining agreement. Pursuant to such notice

each of said plaintiffs was thereafter without just cause, maliciously and wrongfully discharged on January 2, 1963, and has not been re-instated, recalled or re-employed by the Company since that date.

5. Several months prior to September 21, 1962, plaintiffs had engaged in lawful personal and union activities; that is: Plaintiffs were members of Local No. 9690, at the Itmann mine, at Itmann, Wyoming County, West Virginia, and had worked at said mine and accumulated seniority there, for some years, when the Company acquired an adjacent mine, known locally as the "Deerfield Mine", from another company and merged it with the Itmann mine. The Company then attempted to apply an unlawful and improper seniority program at Itmann preferring "Deerfield men" to the older Itmann men, and in collaboration with the International Union, United Mine Workers of America, "merged" the seniority list of Local 9690 and of the former local of said "Deerfield Mine." In the summer of 1962, when lay-offs appeared imminent plaintiffs sought the advice of a practicing attorney, a member of the West Virginia State Bar concerning their seniority rights in such event, and procured a written opinion which pertained to their seniority status at the "Itmann" mine. They also procured some written directions concerning how to raise the issue under the collective bargaining agreement, and the grievance procedure provided for therein, if laid-off, and also attempted to solicit money from other union members by voluntary contribution to help pay said attorney for his services. While all of the foregoing was going on representatives of Local Union No. 9690, and of District 29, United Mine Workers of America, had been processing, or attempting to process, several individual grievance claims (not involving any plaintiff except William McCoy). These negotiations, to which plaintiffs were

not parties, failed, and on September 21, 1962, there was a work stoppage at the Itmann mine, which was not led, instigated, caused, or called by plaintiffs or any of them, although, after it began, plaintiffs did appear on a picket line with 200 to 300 other employees, including many Deerfield men, all known to the management officials of the Company. The work stoppage or strike was caused or called by certain officers of Local Union No. 9690, with the knowledge and consent of representatives of District 29, United Mine Workers of America and was led by one or more of the Mine Committeemen who were so-called "Deerfield men." The work stoppage or strike was concerted union activity and was ended on September 23, 1962, by concerted action of the members of Local Union 9690 at a union meeting. It was recognized as concerted activity by the Company when pending return of the miners to work it secured an injunction from the Circuit Court of Wyoming County, West Virginia, against the officers of Local Union No. 9690, including B. P. Lewallen, President, Clarence Smith, Vice-President, Isaac Sizemore, Secretary, John Thomas, Recording Secretary, Douglas Lambert, Chairman Mine Committee, and Curtis Caudill, Member Mine Committee. Said officers included two of the plaintiffs but they did not participate in calling the strike or leading it. In any event after the decision to return to work, all of plaintiffs, (excepting Lee Looney who worked on a later shift) went into the mine together with the several hundred others, including the instigators and leaders of said strike, who were well known to the Company officials, and worked the shifts beginning Sunday night, September 23, 1962, and Monday morning, September 24, 1962. The defendant, the Company, thereupon elected to discharge, and did discharge, the nine plaintiffs herein on September 24, 1962, but did not discharge any other person or persons at such time or, in any way, connected

with said picket line. These discharges were arbitrary, capricious, malicious, wrongful and unjust and therefore in violation of said collective bargaining agreement; (a) if, for being on the picket line, said discharges were for participating in concerted union activity and were arbitrary and unjustifiably discriminatory because of lawful union activity, (b) if, instead of the ostensible reason given, said discharges were in truth because of the earlier lawful activity on the part of plaintiffs in consulting an attorney for advice about the seniority provisions of the contract and seeking to collect a fee for his services, which is the true cause alleged by plaintiffs herein, then said discharges were capricious and unjust and in violation of the collective bargaining agreement.

6. The collective bargaining agreement provided for "Settlement of Local and District Disputes" by a grievance procedure set forth in paragraph 2 above, and plaintiffs were advised to make claim for re-instatement and back pay. Plaintiffs aver however that the subsequent processing of their respective grievance claims, purportedly in accordance with the collective bargaining agreement, was not in good faith on the part of the Company and the union representatives but was fraudulent and void and said procedure, in itself, was used as an instrument to further violate the collective bargaining agreement by wilful and malicious obstruction of plaintiffs' lawful demand for correction of the wrongful discharges in question. Plaintiffs aver that the apparent exhaustion of their contractual remedy resulted in a fraudulently obtained and fraudulently induced Umpire's decision affirming said discharges and denying plaintiffs just and proper relief. Plaintiffs aver that the Company, by its agents, at the beginning of said grievance procedure, wilfully, maliciously and unlawfully threatened the representatives of Local Union No.

9690 and District 29, United Mine Workers of America, with drastic suits and other penalties under the so-called Taft-Hartley Act, and likewise asserted such threats against the plaintiffs and thereby fraudulently misled, cowed and browbeat plaintiffs and said union representatives by fear of drastic reprisals against the local union, into waiver of their lawful right and duty to present all the true and necessary facts and evidence to the determining agent or authority at each stage of the grievance procedure. Under the effect and influence of such threats, the Mine Committee of Local No. 9690, which contained one or more "Deerfield men" who had led said work stoppage (a fact well known to the Company at the time) and representatives of District 29, United Mine Workers of America, conspired with representatives and agents of the Company to withhold pertinent information from the conferring committees, the Joint Board and the Umpire, and to omit a fair, adequate, just, and full presentation of evidence and facts in support of plaintiffs' claims, to the end that the discharges of plaintiffs, (who had dared to seek legal advice concerning their seniority claims) would be affirmed by a Joint Board or an Umpire. Pursuant to said threats and conspiracy the Company was permitted to create a "record" which did not contain any showing that the work stoppage was a concerted union activity, that the discharge of these nine plaintiffs was discriminatory, arbitrary and capricious, that they had not led, instigated, caused or called the strike, that the true reason for their discharge was lawful union activity with reference to contractual seniority, and that all of these things were known to the Employer, but, upon the contrary, said Company was permitted, without opposition, to create a "record" that contained grossly false accusations against the plaintiffs, false intimations of nonexistent violence, and the impression that plaintiffs were

leaders of wildcat strikes who were the only identifiable participants upon a picket line of 200 to 300 men. In further pursuance thereof, said "record", in writing, was presented by the Company, to an Umpire selected by said conspirators, and plaintiffs advised that when the Umpire would offer them an opportunity to testify, to refuse to do so and to rely solely upon said "record." Plaintiffs, believing the recommended procedure was in good faith, relied thereon to their detriment, and now aver that said grievance procedure was wilfully and fraudulently used to "frame" them; wherefore it is void and should be so declared by whatever order or decree is apt and proper to vacate the same or any part thereof. And plaintiffs aver that such use by the Company constitutes in itself a further violation of the collective bargaining agreement and of the employment contract of each plaintiff.

7. The wrongful and fraudulent Umpire's decision, affirming said discharges, was made by Honorable Edward A. Lynch, December 31, 1962, and final discharges made effective January 2, 1963.

8. Pending the final wrongful discharge the Company, in a further attempt to cow and browbeat plaintiffs and their union representatives, maliciously, deliberately and wrongfully posted and published the names of plaintiffs as intended dischargees, and also for the purpose of ruining their individual credit and good names, and visiting upon them and their families injury and hardship and privation.

9. By reason of said wrongful discharges and said wilful and malicious acts set forth above, and the further circulation of said information in the coal industry, each of said plaintiffs was injured in his good name, fame and credit; was denied and lost wages to which he

was otherwise entitled under his continuing employment status and the said collective bargaining agreement, and suffered economic hardship, loss and damage, for which each plaintiff is entitled to recover an amount equivalent to the wages he otherwise would have earned from January 2, 1963, up to and including the date of institution of this action, plus vacation pay, and such general damages actually suffered as a direct and proximate result of said defendant's wrongful discharge of each of them. Plaintiffs also are entitled to recover punitive damages for the malicious and wilful acts alleged above.

10. By reason of said wrongful discharges each of the plaintiffs hath been deprived of at least the sum of $7,250.00 in wages which he otherwise would have earned, or to which he would have been entitled, since January 2, 1963, to the date of institution of this action, plus vacation pay in the amount of $400.00, and other damages for breach of contract and wrongful acts of the employer in the amount of $1,000.00, making a total compensatory damage claim of each plaintiff in the amount of $8,650.00. In addition to said compensatory damages each of said plaintiffs is entitled to, and claims, $3,000.00 in punitive damages against the defendant Consolidation Coal Company.

Wherefore, plaintiffs demand that judgment be entered against the defendants vacating and setting aside the arbitration decision of Umpire Edward A. Lynch, of December 31, 1962, and declaring the same of no legal force and effect and a proper arbitration hearing with full protection of plaintiffs' rights be had, or judgment be had by each of the plaintiffs against Consolidation Coal Company, a corporation, as follows: John Thomas, $8,650.00 plus punitive damages in the amount of $3,000.00, and his costs; William McCoy, $8,650.00 plus punitive damages in the amount of $3,000.00 and

his costs; John Salters, $8,650.00 plus punitive damages in the amount of $3,000 and his costs; Isaac Sizemore, $8,650.00 plus punitive damages in the amount of $3,000.00, and his costs; Ray Trantham, $8,650.00 plus punitive damages in the amount of $3,000.00 and his costs; Ellis Coleman, Jr., $8,650.00 plus punitive damages in the amount of $3,000.00 and his costs; Lee Looney, $8,650.00 plus punitive damages in the amount of $3,000.00 and his costs; John Yates, $8,650.00 plus punitive damages in the amount of $3,000.00, and his costs; and Charles Taylor, $8,650.00 plus punitive damages in the amount of $3,000.00, and his costs.

APPENDIX E

February 8, 1965

Honorable R. M. Worrell
Judge of the Circuit Court
Pineville, West Virginia

Re: Thomas et als vs. Consolidation Coal Company et als

Dear Judge Worrell:

Pending in this case at the present stage are three pertinent motions:

(1) Motion of Consolidation Coal Company to dismiss for want of jurisdiction, and for lack of cause of action against it.

(2) Similar motions by George Titler, Harry Gibson, Douglas Lambert and Curtis Cordell, to dismiss them as individual defendants.

(3) Motion of plaintiffs to strike certain irrelevant and impertinent exhibits filed with Consol's answer to the complaint.

Briefs have been filed or will soon be completed extensively arguing all of these questions, or certainly covering all of them.

Plaintiffs propose that the questions raised thereby be submitted to you for ruling at this time, but that the question of the jurisdiction of this Court be passed upon distinctly and separately from the others in order that the question of removal to a Federal court, if invoked by any party, will not be confused with the issue of parties and cause of action.

Counsel for defendants are requested to concur herein, and in submission, as suggested, by writing to you, with copy to the undersigned.

Respectfully,
D. GROVE MOLER
Attorney for Plaintiffs

DGM:f

cc: Mr. John W. Gillespie
Attorney at Law
Tazewell, Virginia

Mr. M. E. Boiarsky
Attorney at Law
Charleston, West Virginia

Mr. Robert Bailey
Attorney at Law
Pineville,
West Virginia

Mr. Harrison Combs
Attorney at Law
Washington, D. C.

Mr. James K.
Edmundson
Attorney at Law
Beckley,
West Virginia

APPENDIX F

(caption omitted)

REPLY BRIEF OF CONSOL COAL

We will attempt to answer the plaintiff's brief in the form that they have submitted it. We divided our motion into six parts and feel that all of these apply. We will, however, devote our attention to this reply in the same manner that the plaintiffs have divided their brief.

JURISDICTION

1. *The subject matter is exclusively in the jurisdiction of either the National Labor Relations Board or the United States District Court.*

It is true the discussion of this has been fully contained in decisions of the United States Supreme Court. Plaintiffs overlook our contention that under the facts of this particular case, jurisdiction is exclusively in the N.L.R.B. or the U. S. District Court. We have pointed out in our original brief on Page 9, under Section 6, the differences between those cases in the U. S. Supreme Court and the present case.

2. Jurisdiction does not exist for an appeal from an unfavorable arbitration award.

We are glad to see plaintiffs state the position that this is an independent initial action.

We are not trying to mislead the court. We do not contend that a proceeding before the N. L. R. B. is an appeal in the precedural sense. However, we do maintain that the plaintiffs charged an unfair labor practise in the same language and the same manner as the present Bill of Complaint and as shown by our exhibits, a

decision was made against the plaintiffs, which they did not attempt to appeal.

3. No court in West Virginia has jurisdiction of this action because of the nature of the action, which is barred by Code 55-8-12 (*Michie* 5494) *or* (*Michie* 5666) *as interpreted by Judge Given in Pettus v. Olga Coal Company,* 137 W. Va. 192, 72 S.E. (2d) 88.

Plaintiffs deny this, then state that they have no quarrel with the statute in Section 5494 of the Code, and that they do not sue upon this basis. They cannot quarrel with this question. The *Pettus* case specifically states that they cannot sue upon this basis. They say, however, that Code Section 5666 provides that they may sue. The *Pettus* case stated that plaintiffs could not maintain an "*action*". The *Pettus* case further said that plaintiffs' rights were at common law and in equity.

THE CAUSE OF ACTION

"We do not say that they have no redress in any court. We do say their redress, if any, under the circumstances of this case, is either under N.L.R.B. or a federal district court. If a charge is made to the National Labor Relations Board and is proven, the Board may not only take disciplinary action against the employer and the Union, but may order such conduct to cease, restore the plaintiffs to employment and direct that their wages be paid. If they elect to proceed in federal district court, they may obtain jurisdiction of the parties and present their claim and if proven, secure a

judgment for the damages. They are therefore, not without redress in any court."

CONCLUSION

It is respectfully submitted to Your Honor that the motion of Consol should be sustained upon all of the six grounds assigned in the motion. Jurisdiction must be shown by the plaintiffs to exist. They have failed to do this under any statute or the common law of West Virginia. They have also failed to show the right to proceed as a matter of law. We feel that they have attempted to proceed upon the basis of a contract, while entirely disregarding the contents thereof. They have pointed out small portions of several opinions, while ignoring the actual content of the opinion in the holding of the court. We cannot find any case which delegates to them the use of a shotgun, to be indiscriminately fired, and thereafter claim any target that might have been accidentally hit.

Respectfully submitted this 17th day of February, 1965.

Robert Bailey

John W. Gillespie

APPENDIX G

September 24, 1964

Honorable Robert Worrell, Judge
Circuit Court of Wyoming County
Pineville, West Virginia

Dear Judge Worrell:

Subject: John Thomas et al. v. Consolidated Coal Company, etc. - Civil Action No. 16434.

This morning I received a copy of a brief filed by Mr. Moler in behalf of the plaintiffs. I enclose herewith a short memorandum submitted on behalf of the movants, Douglas Lambert and Curtis Cordell. The enclosed brief is not by way of reply to Mr. Moler's brief, except generally, and is motivated as indicated or expressed therein, with the idea that there is a serious question as to jurisdiction even if one point alone is considered. I have kept the brief confined to the one point, namely, pre-emption.

You will note that I have failed to give exact citations at several places in the brief. They are not at hand but as quickly as I can supply the omission to you and counsel, I will do so.

Copy of this letter and my memorandum are being forwarded to Messrs. Moler, Bailey and Gillespie.

Very truly yours,
James K. Edmundson

JKE/te
Enclosure

cc: D. Grove Moler, Esquire
Robert D. Bailey, Esquire
John W. Gillespie, Esquire

APPENDIX H

(caption omitted)

MEMORANDUM AND AUTHORITIES ON BEHALF OF THE MOVANTS, DOUGLAS LAMBERT AND CURTIS (CAUDILL) CORDELL IN SUPPORT OF THEIR MOTION TO DISMISS.

This short memorandum and citation of authority is unquestionably prompted by, but not intended to be in reply to the memorandum of authorities filed on behalf of the plaintiffs pertaining to the several issues thus far raised. Counsel for the above movants has not yet had the time to digest the brief filed by plaintiff's counsel. Nevertheless, there is one issue overriding all of the others thus far raised, and counsel for these movants humbly submits that the paramount issue is whether the Circuit Court of Wyoming County, West Virginia, has the jurisdiction to entertain, hear and determine the cause. We will, at this time, cite only some of the recent cases decided by the United States Supreme Court, and by several of the state courts where the issue has been raised within the past year or so. Thus far, counsel for movants has found no applicable West Virginia case worth mentioning on the point to be raised herein.

In the first paragraph of the third (or fourth) page of his brief, counsel for plaintiffs says, in effect, that this case involves collective bargaining in interstate commerce and that a state court must apply federal law. Conceding for the moment that this is true (and actually it is the above assertion that motivates this preliminary memorandum) there is extant at this time a number of very recent federal and state cases in point. Apparently, the philosophy behind the legislation and judicial interpretations of the law now prevailing is to preclude conflicting decisions between the various state

courts amongst themselves and with the federal adjudication agencies and courts.

Apparently, commencing with *San Diego Building Trades et al v. Garmon,* 359 U.S. 236, 3 L. ed. 775, the law seems to be that if it is "arguable" that the issues in any case fall within Sections 7 or 8 of the Federal Management Relations Act (29 U.S.C. (157 and 158) a state court is ousted of jurisdiction ab initio and cannot even grant damages to redress private wrongs (see near bottom of page 246 of 359 U.S.) The sole forum to which a would-be litigant can address himself in such circumstances is the National Labor Relations Board. In *Local 100, etc. v. Borden* (1963), U. S. , 10 L. ed. 638, where the plaintiff sued his union for alleged discriminatory practices against him, the Court held that it was arguable that the alleged misconduct of the union either violated or was protected by the National Labor Relations Act and, citing the Garmon case (supra), held that a state court had no jurisdiction. Parenthetically, the Borden case mentioned that the first inquiry a state court should consider, if the issue is raised, is whether or not the court has jurisdiction, or, putting it another way, whether the National Labor Relations Board has exclusive jurisdiction. In *Iron Workers Union v. Perko,*

U.S. , 10 L. ed. 646, the union member sued his union in state court, alleging a conspiracy to deprive him of the right to continue to work. There, in the last paragraph of the opinion the Court held:

> "We do not of course intimate any view on the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold as we do, that it is plain on a number of scores that the subject matter of this law suit 'arguably comes

within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be reversed."

See also: *Garner v. Teamsters,* 346 U.S. 485, S. Ct. 161, 98 L. ed. 228; *Blum v. Machinists,* 80 N. J. Sup. 837, 192 A2d 842; *Hill v. Moe,* 367 Pac. 2d 737

(Note: The Blum case (supra) was based on or was an action in a state court to recover for, among other things, libel committed during a labor dispute. It was held that the state court had no jurisdiction.)

In Young v. Steelworkers, A2d , decided January 7, 1964, the Supreme Court of Pennsylvania, Eastern District, held that a lower court acted properly in refusing jurisdiction to entertain an employee's suit for back pay which was predicated on allegations that as a consequence of his union's misconduct, he was discharged. It cited a previous holding (Wax v. Int. Mailer's Union, 400 Pa. 173, A2d), and said, among other things, the following:

"Although the plaintiff here complains of the Union's alleged misconduct, the real injury stressed, as resulting from the Union's misconduct, was the termination of the employer-employee relationship, for which he claims back pay. The matter thus falling arguably within the jurisdiction of the National Labor Relations Board, the court below properly declined to take jurisdiction."

The Pennsylvania Supreme Court, Western District, on October 9, 1963, A2d , went further than its

above eastern counterpart, in *Smith v. Pittsburgh Gage & Supply Company,* A2d , wherein plaintiffs complained their union and employer conspired together and as a consequence they were wrongfully discharged. Among other things, they asked punitive damages. Plaintiffs claimed (as in the instant case) that the state court had jurisdiction because of the wrongful interference with a contractual relationship. They also claimed they had no knowledge of the conspiracy between the Union and their employer until after the expiration of the six months filing period within which complaint must be filed with the National Labor Relations Board, and, therefore, the state court should assume jurisdiction. However, the Court not only held that the National Labor Relations Board had exclusive jurisdiction; it also was of the opinion that the employee's contention that a state court should assume jurisdiction (it did not have in the first place) because plaintiff's rights, if any, were barred so far as the Labor Board was concerned, was without merit. To a like effect, with reference to the application of the six months limitation is the case of *Gulfcoast Transit Company v. N.L.R.B.* (5-Cir), 332 F2d 28. Compare 227 F S. 9.

Anticipating that counsel for plaintiffs may contend that the alleged conspiracy between Consolidated and the others named as defendants in the instant case is not within the purview of the Labor Management Relations Act, the following cases are cited:

Allen v. Armored Car etc., 185 F. Supp. 492
Csokuly v. Loblaw, decided in February 1964, F. Supp.

As expressed or implied above, it is the object of this hasty memorandum to endeavor to direct the attention of the Court to what appears to counsel for these

movants to the issue that overrides all others at this time, for if the exclusive jurisdiction is vested in the National Labor Relations Board as the cases all seem to indicate, then the motion of the movants to dismiss should be sustained without consideration to whatever other questions may be raised in this Court.

Respectfully submitted,

Counsel for the Movants,
Douglas Lambert and Curtis
(Caudill) Cordell.